Debarment and Suspension of Government Contractors: An Overview of the Law Including Recently Enacted and Proposed Amendments

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Summary

Debarment or suspension of contractors is one means agencies use to ensure that they deal only with contractors who are responsible in fulfilling their legal and contractual obligations. Debarment removes contractors' eligibility for government contracts for a fixed period of time, while suspension prohibits contractors from receiving government contracts for the duration of an agency investigation or litigation. Like government procurement law generally, the law of suspension and debarment has multiple sources, and contractors can currently be debarred or suspended either under statutory provisions or under the Federal Acquisition Regulation (FAR).

Some statutes require or allow agency officials to exclude contractors that have engaged in conduct prohibited under the statute. Such statutory debarments and suspensions are also known as inducement debarments and suspensions because they further induce contractor compliance with statutes. Statutory debarments and suspensions are federal-government-wide; they are often mandatory, or at least beyond agency heads' discretion; and they are punishments. Statutes prescribe the debarments' duration, and agency heads generally cannot waive statutory debarments.

The FAR also authorizes debarment and suspension of contractors. Such administrative debarments and suspensions are also known as procurement debarments and suspensions because they protect government interests in the procurement process. Administrative debarments can result when contractors are convicted of, found civilly liable for, or found by agency officials to have committed certain offenses, or when other causes affect contractor responsibility. Administrative suspensions can similarly result when contractors are suspected of, or indicted for, certain offenses, or when other causes affect contractor responsibility. Administratively debarred or suspended contractors are excluded from contracts with executive branch agencies. Administrative exclusions are discretionary and can be imposed only to protect government interests. Agencies can use administrative agreements instead of debarment and can continue the current contracts of debarred contractors. The seriousness of a debarment's cause determines its length, which generally cannot exceed three years, but agency heads can waive debarments for compelling reasons.

For debarment and suspension to operate most effectively, agency officials should know which contractors have been excluded, and they also need information about contractors' potentially excludable conduct. The Excluded Parties List System (EPLS) (https://www.epls.gov) has long listed presently ineligible contractors, and the 110th Congress enacted two laws increasing the amount of information available to agency officials about potentially excludable conduct. One law (P.L. 110-252, §§ 6101-6103) requires contractors to notify agency officials of overpayments or federal crimes in connection with the award or performance of government contracts, and the other law (P.L. 110-417, §§ 871-873) requires the creation of a database with information about contractors beyond that in EPLS (e.g., administrative agreements, terminations for default).

The magnitude of federal spending on contracts, coupled with recent high-profile examples of contractor misconduct, has prompted Congress to consider ways to make debarment and suspension more effective means of ensuring that the government does not deal with nonresponsible contractors. The 111th Congress has enacted one bill on debarment and suspension (P.L. 111-8, § 507) and is considering additional legislation (H.R. 595, H.R. 1334, H.R. 1668, H.R. 1983, H.R. 2349, H.R. 2568, H.R. 2708, H.R. 2825, S. 265, H.Amdt. 268 to H.R. 2647).

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As a general rule, government agencies contract with the lowest qualified responsible bidder or offeror. Debarment and suspension relate to the responsibility of bidders and offerors. Government agencies debar and suspend contractors in order to preclude future contractual dealings with contractors that are "nonresponsible," or not responsible, in fulfilling their legal or contractual obligations. Debarment removes contractors' eligibility for government contracts for a fixed period of time, while suspension prohibits contractors from receiving government contracts for the duration of an agency investigation or litigation. Debarment and suspension are collectively known as exclusions.

This report reviews the legal framework for the exclusion of government contractors and discusses recent congressional efforts to make contractor debarment and suspension more effective means of ensuring that the government does not deal with nonresponsible contractors. Another means of avoiding nonresponsible contractors, responsibility determinations, is discussed in a separate report: CRS Report R40633, *Responsibility Determinations Under the Federal Acquisition Regulation: Legal Standards and Procedures*, by Kate M. Manuel.

Overview of Debarment and Suspension

Contractors can currently be debarred or suspended under federal statutes or under the Federal Acquisition Regulation (FAR), an administrative rule governing contracting by executive branch agencies.[1] There is only one explicit overlap between the causes of debarment and suspension under statute and those under the FAR, involving debarments and suspensions for violations of the Drug-Free Workplace Act of 1988.[2] However, the "catch-all" provisions of the FAR—which allow (1) debarment for "any ... offense indicating a lack of business integrity or business honesty" and (2) debarment or suspension for "any other cause of [a] serious or compelling nature"[3]—could potentially make the same conduct a grounds for debarment or suspension under statute and under the FAR.

Statutory Debarment and Suspension

Some federal statutes include provisions specifying that contractors who engage in certain conduct prohibited under the statute shall or may be debarred or suspended from future contracts with the federal government.[4] Because they are designed to provide additional inducement for contractors' compliance with the statutes, such statutory debarments and suspensions are also known as inducement debarments and suspensions. The terms "statutory debarment" and "statutory suspension" are also used in reference to exclusions that result under executive orders,[5]

[1] The FAR is promulgated by the General Services Administration (GSA), the Department of Defense (DOD), and the National Aeronautics and Space Administration (NASA) under the authority of the Office of Federal Procurement Policy Act of 1974. *See* Office of Federal Procurement Policy Act of 1974, P.L. 93-400, 88 Stat. 796 (codified at 41 U.S.C. §§ 401-38); DoD, GSA & NASA, Establishing the Federal Acquisition Regulation: Final Rule, 48 Fed. Reg. 42,102, 42,142 (Sept. 19, 1983).

[2] The Drug-Free Workplace Act of 1988, P.L. 100-690, §§ 5151-5160, 102 Stat. 4181 (codified at 41 U.S.C. §§ 701-07), is mentioned in FAR 9.406-2(b)(1)(ii) and 9.407-2(a)(4), which corresponds to 48 C.F.R. § 9.406-2(b)(1)(ii) and 9.407-2(a)(4).

[3] 48 C.F.R. § 9.406-2(a)(5) & (c); 48 C.F.R. § 9.407-2(c).

[4] *See, e.g.*, 21 U.S.C. § 862 (authorizing debarment for violations of federal or state controlled substance laws).

[5] *See, e.g.*, Executive Order 11246, as amended (providing for suspension of contractors who fail to comply with equal (continued...)

even though executive orders are not statutes, as a way of grouping exclusions that result from executive orders with other inducement-based exclusions and contrasting them with administrative or procurement exclusions.

Statutes providing for debarment and suspension often require that the excluded party be convicted of wrongdoing under the statute, but at other times, findings of wrongdoing by agency heads suffice for exclusion.[6] Sometimes the exclusion applies only to certain types of contractors, or dealings with specified agencies (e.g., institutions of higher education who contract with the government, contracts with the Department of Defense).[7] Most of the time, however, the exclusion applies more broadly to all types of contractors dealing with all federal agencies.[8] Persons identified by statute—often the head of the agency administering the statute requiring or allowing exclusion—make the determinations to debar or suspend contractors.[9] Debarments last for a fixed period specified by statute, while suspensions last until a designated official finds that the contractor has ceased the conduct that constituted its violation of the statute.[10] Generally, statutory exclusions can only be waived by a few officials under narrow circumstances, if at all.[11] Agency heads generally cannot waive exclusions to allow debarred or suspended contractors to contract with their agency. **Table 1** surveys the main statutory debarment and suspension provisions presently in effect.

Table 1. Statutory Debarments and Suspensions

Statute	Cause of Debarment	Mandatory or Discretionary	Decision Maker	Duration & Scope	Waiver of Debarment
Buy American Act (41 U.S.C. § 10(b))	Violations of the Buy American Act in constructing, altering, or repairing any public building or work in the United States using appropriated funds	Mandatory	Head of the agency that awarded the contract under which the violation occurred	3 years; government-wide	Not provided for
Clean Air Act (42 U.S.C. § 7606)	Conviction for violating 42 U.S.C. § 7413(c)	Mandatory	EPA Administrator	Lasts until EPA Administrator certifies the condition is corrected;	Waiver by President when he or she determines it is in the paramount

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employment opportunity and affirmative action requirements).

[6] *Compare* 21 U.S.C. § 862 (debarment based on conviction) *with* 41 U.S.C. § 10(b) (debarment based on agency head's findings).

[7] *See, e.g.*, 10 U.S.C. § 983 (debarment for institutions of higher education only); 48 C.F.R. § 209.470 (same); 10 U.S.C. § 2408 (debarment from Department of Defense contracts only).

[8] *See, e.g.*, 40 U.S.C. § 3144 (government-wide debarment for failure to pay wages under the Davis-Bacon Act).

[9] *See, e.g.*, 42 U.S.C. § 7606 (Administrator of the Environmental Protection Agency to debar contractors for certain violations of the Clean Air Act).

[10] *Compare* 41 U.S.C. § 701(d) (providing for debarment for up to five years) *with* 33 U.S.C. § 1368 (suspensions for certain violations of the Clean Water Act end with the violation).

[11] *Compare* 33 U.S.C. § 1368 (allowing the President to waive a debarment "in the paramount interests of the United States" with notice to Congress) *with* 40 U.S.C. § 3144 (making no provisions for waiver).

Statute	Cause of Debarment	Mandatory or Discretionary	Decision Maker	Duration & Scope	Waiver of Debarment
				government-wide *but* limited to the facility giving rise to the conviction	interests of the United States and notifies Congress
Clean Water Act (33 U.S.C. § 1368)	Conviction for violating 33 U.S.C. § 1319(c)	Mandatory	EPA Administrator	Lasts until EPA Administrator certifies the condition is corrected; government-wide *but* limited to the facility giving rise to the conviction	Waiver by President when he or she determines it is in the paramount interests of the United States and notifies Congress
Davis-Bacon Act (40 U.S.C. § 3144)[a]	Failure to pay prescribed wages for laborers and mechanics	Mandatory	Comptroller General	3 years; government-wide	Not provided for
Drug-Free Workplace Act of 1988 (41 U.S.C. § 701(d))	Violations of the act as shown by repeated failures to comply with its requirements, or employing numerous individuals convicted of criminal drug violations	Mandatory	Head of the contracting agency	Up to 5 years; government-wide	Waiver under FAR procedures
Executive Order 11246, as amended	Failure to comply with equal employment opportunity and affirmative action requirements	Discretionary	Secretary of Labor	Lasts until the contractor complies with the EEO and affirmative action requirements; government-wide	Not provided for
Military Recruiting on Campus (10 U.S.C. § 983; 48 C.F.R. § 209.470)	Policy or practice prohibiting military recruiting on campus	Mandatory	Secretary of Defense	Lasts so long as the policy or practice triggering the suspension; limited to Department of Defense Contracts	Not provided for
Service Contract Act (41 U.S.C. § 354)	Failure to pay compensation due to employees under the act	Mandatory	Secretary of Labor or the head of any agency	3 years; government-wide	Waiver by the Secretary of Labor because of unusual circumstances
Walsh-Healey Act (41 U.S.C. § 37)	Failure to pay the minimum wage, requiring mandatory and uncompensated	Mandatory	Secretary of Labor	3 years; government-wide	Waiver by the Secretary of Labor; no criteria for

Statute	Cause of Debarment	Mandatory or Discretionary	Decision Maker	Duration & Scope	Waiver of Debarment
	overtime, use of child labor, or maintenance of hazardous working conditions				waiver specified
Sudan Accountability and Divestment Act (P.L. 110-174)	Falsely certifying that the contractor does not "conduct business operations" in the Sudan	Discretionary	Any executive-branch agency head	3 years; government-wide	Not provided for

Source: Congressional Research Service.

Notes: The term "statutory" is used here, as is customary, to contrast all types of inducement exclusions—whatever their legal basis—with those exclusions under the FAR that are designed to protect the government's interests in the procurement process.

There are two other statutory provisions discussing debarment that are not included in this table because they provide for personal debarment. Section 862 of Title 21 of the United States Code allows the court sentencing an individual for violating federal or state laws on the distribution of controlled substances to debar that individual for up to one year, in the case of first-time offenders, or for up to five years, in the case of repeat offenders. Section 2408 of Title 10 of the United States Code similarly prohibits persons who have been convicted of fraud or any other felony arising out of a contract with DOD from working in management or supervisory capacities on any DOD contract, or engaging in similar activities. Contractors who knowingly employ such "prohibited persons" are themselves subject to criminal penalties.

a. The statutory debarment provided for in the Davis-Bacon Act is better known under its former location within the United States Code, 40 U.S.C. § 276a-2(a).

Administrative Debarment and Suspension

As a matter of policy, the federal government seeks to "prevent improper dissipation of public funds"[12] in its contracting activities by dealing only with responsible contractors.[13] Debarment and suspension promote this policy by precluding agencies from entering into new contractual dealings with contractors whose prior violations of federal or state law, or failure to perform under contract, suggest they are nonresponsible.[14] Because exclusions under the FAR are designed to protect the government's interests, they may not be imposed solely to punish prior contractor misconduct.[15] Federal courts will overrule challenged agency decisions to debar

[12] United States v. Bizzell, 921 F.2d 263, 267 (10th Cir. 1990) ("It is the clear intent of debarment to purge government programs of corrupt influences and to prevent improper dissipation of public funds. Removal of persons whose participation in those programs is detrimental to public purposes is remedial by definition.") (internal citations omitted).

[13] 48 C.F.R. § 9.402(a) (directing agency contracting officers to "solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only").

[14] *See id.* ("Debarment and suspension are discretionary actions that ... are appropriate means to effectuate [the] policy [of dealing only with responsible contractors].").

[15] 48 C.F.R. § 9.402(b) ("The serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment.").

contractors when agency officials seek to punish the contractor—rather than protect the government—in making their exclusion determinations.[16]

Debarment

The FAR allows agency officials to debar contractors from future executive branch contracts under three circumstances. First, debarment may be imposed when a contractor is convicted of or found civilly liable for any integrity offense. Integrity offenses include the following:

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a public contract or subcontract
- violations of federal or state antitrust laws relating to the submission of offers
- embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violating federal criminal tax laws, or receipt of stolen property
- intentional misuse of the "Made in America" designation
- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor[17]

Second, in the absence of convictions or civil judgments, debarment may be imposed when government officials find, by a preponderance of the evidence, that the contractor committed certain offenses. These offenses include the following:

- serious violations of the terms of a government contract or subcontract[18]
- violations of the Drug-Free Workplace Act of 1988[19]
- intentionally affixing a "Made in America" label, or similar inscription, on ineligible products
- commission of an unfair trade practice as defined in Section 201[20] of the Defense Production Act

[16] *See, e.g.*, IMCO, Inc. v. United States, 97 F.3d 1422, 1427 (Fed. Cir. 1996) (upholding an agency's debarment determination but noting that the outcome would have been different had the debarment been imposed for purposes of punishment).

[17] 48 C.F.R. § 9.406-2(a)(1)-(5).

[18] For purposes of the FAR, serious violations of the terms of a government contract or subcontract include (1) willful failure to perform in accordance with a term of the contract or (2) a history of failure to perform or unsatisfactory performance under contract. 48 C.F.R. § 9.406-2(b)(1)(i)(A)-(B).

[19] Such violations include (1) failure to comply with the requirements in Section 52.223-6 of the FAR or (2) employment of so many persons who have been convicted of violating criminal drug statutes in the workplace as to indicate that the contractor failed to make good faith efforts to provide a drug-free workplace. 48 C.F.R. § 9.406-2(b)(1)(ii)(A)-(B). FAR 52.223-6 requires that contractors (1) publish a statement notifying employees that the manufacture, distribution, possession, or use of controlled substances in the workplace is prohibited and specifying actions to be taken in response to employee violations; (2) establish drug-free awareness programs to inform employees of the policy; (3) provide employees with a written copy of the policy; (4) notify employees that their continued employment is contingent upon their compliance with the policy; (5) notify agency contracting officials of employee convictions for violations of controlled substance laws; and (6) take steps to terminate or ensure treatment of employees convicted of violating controlled substance laws.

[20] Section 201 covers (1) violations of Section 337 of the Tariff Act of 1930; (2) violations of agreements under the (continued...)

- delinquent federal taxes in an amount exceeding $3,000[21]
- knowing failure by a principal to timely disclose to the government credible evidence of (1) violations of federal criminal laws involving fraud, conflict of interest, bribery, or gratuity offenses covered by Title 18 of the United States Code; (2) violations of the civil False Claims Act; or (3) significant overpayments on the contract[22] that occurred in connection with the award, performance or closeout of a federal contract or subcontract and were discovered within three years of final payment[23]

Debarment can also result, under this provision of the FAR, when the Secretary of Homeland Security or the Attorney General finds, by a preponderance of the evidence, that a contractor has not complied with the employment provisions of the Immigration and Nationality Act.[24]

Third, and finally, debarment may be imposed whenever an agency official finds, by a preponderance of the evidence, that there exists "any other cause of so serious or compelling a nature that it affects the present responsibility of a contractor."[25]

Debarments last for a "period commensurate with the seriousness of the cause(s)," generally not exceeding three years.[26] Debarment-worthy conduct can be imputed from officers, directors, shareholders, partners, employees, or other individuals associated with a contractor to the contractor, and vice versa, as well as between contractors participating in joint ventures or similar arrangements.[27] Due process requires that contractors receive written notice of proposed debarments and of debarring officials' decisions, as well as the opportunity to present evidence within the decision-making process for all debarments except those based upon contractors' convictions.[28]

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Export Administration Act of 1979 or similar bilateral or multilateral export control agreements; or (3) knowingly false statements regarding material elements of certifications concerning the foreign content of an item.

[21] Federal taxes are considered delinquent, for purposes of this provision, when (1) tax liability is finally determined and (2) the taxpayer is delinquent in making payment. *See* 48 C.F.R. § 9.406-2(b)(v)(A)(1)-(2).

[22] Overpayments resulting from contract financing payments, as defined under 48 C.F.R. § 32.001, are excluded here. *See* 48 C.F.R. § 9.406-2(b)(vi)(C).

[23] 48 C.F.R. § 9.406-2(b)(1)(i)-(vi).

[24] 48 C.F.R. § 9.406-2(b)(2).

[25] 48 C.F.R. § 9.406-2(c).

[26] 48 C.F.R. § 9.406-4(a)(1). Debarments are limited to one year for violations of the Immigration and Nationality Act, but can last up to five years for violations of the Drug-Free Workplace Act. 48 C.F.R. § 9.406-4(a)(1)(i)-(ii). The FAR allows debarring officials to extend the debarment for an additional period if they determine that an extension is necessary to protect the government's interests. 48 C.F.R. § 9.406-4(b). Extension cannot be based solely upon the facts and circumstances upon which the initial debarment was based, however. *Id.*

[27] 48 C.F.R. § 9.406-5(a)-(c).

[28] 48 C.F.R. § 9.406-3. When debarment is based on a conviction, the hearing that the contractor received prior to the conviction suffices for due process in the debarment proceeding.

Suspension

The FAR also allows agency officials to suspend government contractors (1) when the officials suspect, upon adequate evidence, any of the following offenses, or (2) when contractors are indicted for any of the following offenses:

- fraud or criminal offenses in connection with obtaining, attempting to obtain, or performing a public contract
- violation of federal or state antitrust laws relating to the submission of offers
- embezzlement, theft, forgery, bribery, falsification or destruction of records, making false statements, tax evasion, violations of federal criminal tax laws, or receipt of stolen property
- violations of the Drug-Free Workplace Act of 1988[29]
- intentional misuse of the "Made in America" designation
- unfair trade practices, as defined in Section 201 of the Defense Production Act[30]
- delinquent federal taxes in an amount exceeding $3,000[31]
- knowing failure by a principal to timely disclose to the government credible evidence of (1) violations of federal criminal laws involving fraud, conflict of interest, bribery, or gratuity offenses covered by Title 18 of the United States Code; (2) violations of the civil False Claims Act; or (3) significant overpayments on the contract[32] that occurred in connection with the award, performance or closeout of a federal contract or subcontract and were discovered within three years of final payment
- other offenses indicating a lack of business integrity or honesty that seriously affect the present responsibility of a contractor[33]

Agency officials may also suspend a contractor when they suspect, upon adequate evidence, that there exists "any other cause of so serious or compelling a nature that it affects the present responsibility of a ... contractor or subcontractor."[34]

A suspension lasts only as long as an agency's investigation of the conduct for which the contractor was suspended, or any ensuing legal proceedings. It may not exceed 18 months unless legal proceedings have been initiated within that period.[35] Suspension-worthy conduct can be imputed, just like debarment-worthy conduct,[36] and similar due-process protections apply.[37]

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[29] *See supra* note 19 for a description of what conduct violates the Drug-Free Workplace Act.

[30] *See supra* note 20 for a listing of unfair trade practices under Section 201 of the Defense Production Act.

[31] *See supra* note 21 for a discussion of what makes federal taxes delinquent for purposes of this provision of the FAR.

[32] Overpayments resulting from contract financing payments, as defined under 48 C.F.R. § 32.001, are excluded here. *See* 48 C.F.R. § 9.406-2(b)(vi)(C).

[33] 48 C.F.R. § 9.407-2(a)(1)-(9) (suspicion on adequate evidence) & 48 C.F.R. § 9.407-2(b) (indictment).

[34] 48 C.F.R. § 9.407-2(c).

[35] 48 C.F.R. § 9.407-4(a).

[36] 48 C.F.R. § 9.407-5.

[37] 48 C.F.R. § 9.407-3(a)-(d). The due process protections with suspension are not as extensive as those with debarment (continued...)

Agency Discretion, Administrative Agreements, Continuation of Current Contracts, and Waivers

Not all contractors who engage in conduct that could lead to debarment or suspension under the FAR are actually excluded, permanently or temporarily, from contracting with executive branch agencies. Nor does the debarment or suspension of a contractor guarantee that executive branch agencies do not presently have contracts with that contractor, or will not contract with that contractor before the exclusion period ends. Several aspects of the exclusion process under the FAR explain why this is so.

First, under the FAR, debarment or suspension of contractors is discretionary.[38] The FAR says that agencies "may debar" or "may suspend" a contractor when grounds for exclusion exist,[39] but it does not require them to do so.[40] Rather, the FAR advises contracting officers to focus upon the public interest in making debarment determinations.[41] The public interest encompasses both (1) safeguarding public funds by excluding contractors who may be nonresponsible from contracting with the government and (2) avoiding economic injury to contractors who might technically be excludable but are fundamentally responsible and safe for the government to contract with.[42] Because of this focus on the public interest, agency officials can find that contractors who engaged in exclusion-worthy conduct should *not* be excluded because they appear unlikely to engage in similar conduct in the future.[43] Any circumstance suggesting that a contractor is unlikely to repeat past misconduct—such as changes in personnel or procedures, restitution, or cooperation in a government investigation—can potentially incline an agency's decision against debarment.[44] Moreover, exclusion can be limited to particular "divisions, organizational elements, or commodities" of a company if agency officials find that only segments of a business engaged in wrongdoing.[45] Other contractors cannot challenge agency decisions not to propose a contractor for debarment or not to exclude a contractor proposed for debarment.[46] They can only contest an

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because suspension is "less serious" than debarment.

[38] 48 C.F.R. § 9.402(a) ("Debarment and suspension are discretionary actions.").

[39] 48 C.F.R. § 9.406-2(a), 9.407-1(a).

[40] 48 C.F.R. § 9.406-1(a) ("The existence of a cause for debarment ... does not necessarily require that the contractor be debarred.").

[41] *Id.* Suspensions under the FAR are based on the standard of the "government's interests." 48 C.F.R. § 9.407-1(a). This is broadly similar, but not identical, to the "public interest," which is why the focus of this paragraph is limited to debarments.

[42] *See, e.g.*, Commercial Drapery Contractors, Inc. v. United States, 133 F.3d 1, 14-15 (D.C. Cir. 1998) ("Suspending a contractor is a serious matter. Disqualification from contracting 'directs the power and prestige of government' at a single entity and may cause economic injury.").

[43] 48 C.F.R. § 9.406-1(a). *See, e.g.*, Roemer v. Hoffman, 419 F. Supp. 130, 132 (D.D.C. 1976) (stating that the proper focus, in debarment determinations, is upon whether the contractor is presently responsible notwithstanding the past misconduct).

[44] 48 C.F.R. § 9.406-1(a)(1)-(10).

[45] *Id.* at (b). *See, e.g.*, Peter Kiewit Sons' Co. v. Army Corp. of Eng'rs, 534 F. Supp. 1139, 1155 (D.D.C. 1982), *rev'd on other grounds*, 714 F.2d 170 (D.C. Cir. 1983) (holding that an agency cannot properly debar a corporation-contractor based upon the misconduct of two subsidiaries and a corporate division).

[46] *See, e.g.*, Heckler v. Chaney, 470 U.S. 821, 832 (1985) (holding that agency refusal to act is generally not judicially reviewable).

agency's certification of a contractor's present responsibility,[47] which is required prior to a contract award.[48]

Second, agencies can use administrative agreements as alternatives to debarment.[49] In these agreements, the contractor generally admits its wrongful conduct and agrees to restitution; separation of employees from management or programs; implementation or extension of compliance programs; employee training; outside auditing; agency access to contractor records; or other remedial measures.[50] The agency, for its part, reserves the right to impose additional sanctions, including debarment, in the future if the contractor fails to abide by the agreement or engages in further misconduct.[51] Such agreements are not explicitly provided for within the FAR, but are within agencies' general authority to determine with whom they contract.[52] Only the agency signing the agreement is a party to it, and other agencies may not be aware of the agreement's existence, a situation which the Government Accountability Office (GAO) has suggested should be remedied in order to provide contracting officers with more complete information about contractors' responsibility when making awards.[53]

Third, even when a contractor is debarred, suspended, or proposed for debarment under the FAR, an agency may generally allow the contractor to continue performance under any current contracts or subcontracts unless the agency head directs otherwise.[54] The debarment or suspension serves only to preclude an excluded contractor from (1) receiving contracts from executive branch agencies; (2) serving as a subcontractor on certain contracts with executive branch agencies;[55] or (3) serving as an individual surety for the duration of the debarment or suspension.[56] Any contracts that the excluded contractor presently has remain in effect unless they are terminated for default or for convenience under separate provisions of the FAR.[57]

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[47] *See, e.g.*, Impresa Construzioni Geom. Domenico Garufi v. United States, 238 F.3d 1324, 1334-39 (Fed. Cir. 2001) (upholding a challenged agency responsibility determination).

[48] 48 C.F.R. § 9.103(b) ("No purchase or award shall be made unless the contracting official makes an affirmative determination of responsibility.").

[49] Office of Management and Budget, *Suspension and Debarment, Administrative Agreements, and Compelling Reason Determinations*, Aug. 31, 2006, *available at* http://www.whitehouse.gov/omb/memoranda/fy2006/m06-26.pdf ("Agencies can sometimes enter into administrative agreements ... as an alternative to suspension or debarment.").

[50] Alan M. Grayson, *Suspension and Debarment* 37-38 (1991).

[51] *See, e.g.*, United States Department of State, Bureau of Political Military Affairs, In the Matter of General Motors Corporation & General Dynamics Corporation, Oct. 22, 2004, *available at* http://www.contractormisconduct.org/ass/contractors/26/cases/108/528/general-dynamics-4_ca.pdf.

[52] 48 C.F.R. § 1.601(a) ("Unless specifically prohibited by another provision of law, authority and responsibility to contract ... are vested in the agency head.").

[53] GAO, *Federal Procurement: Additional Data Reporting Could Improve the Suspension and Debarment Process* 12-13 (2005), *available at* http://www.gao.gov/highlights/d05479high.pdf.

[54] 48 C.F.R. § 9.405-1(a). However, when the existing contracts or subcontracts are "indefinite quantity" contracts, an agency may not place orders exceeding the guaranteed minimum. 48 C.F.R. § 9.405-1(b)(1). Similarly, an agency may not (1) place orders under optional use Federal Supply Schedule contracts, blanket purchase agreements, or basic ordering agreements with excluded contractors or (2) add new work, exercise options, or otherwise extend the duration of current contracts or orders. 48 C.F.R. § 9.405-1(b)(2)-(3).

[55] With subcontracts that are subject to agency consent, there can be no consent unless the agency head provides compelling reasons for the subcontract. 48 C.F.R. § 9.405-2(a). With subcontracts that are not subject to agency consent, there must be compelling reasons for the subcontract only when its amount exceeds $30,000. 48 C.F.R. § 9.405-2(b).

[56] 48 C.F.R. § 9.405(a)-(c); § 9.405-2(a)-(b).

[57] *See* 48 C.F.R. § 49.000-607.

Finally, the FAR authorizes agencies to waive a contractor's exclusion and enter into new contracts with a debarred or suspended contractor.[58] For an exclusion to be waived, an agency head must "determine, in writing, that there is a compelling reason to do so."[59] Compelling reasons exist when (1) goods or services are available only from the excluded contractor; (2) an urgent need dictates dealing with the excluded contractor; (3) the excluded contractor and the agency have entered an agreement not to debar the contractor that covers the events upon which the debarment is based; or (4) reasons relating to national security require dealings with the excluded contractor.[60] Waivers are agency-specific and are not regularly communicated to other agencies, a situation which the GAO has also suggested remedying.[61] Agency determinations about the existence of compelling reasons are not, *per se*, reviewable by the courts; however, other contractors can challenge awards to formerly excluded contractors through the customary bid protest process.[62] Moreover, even when an agency does not waive a contractor's exclusion, it can reduce the period or extent of debarment if the contractor shows (1) newly discovered material evidence; (2) reversal of the conviction or civil judgment on which the debarment was based; (3) bona fide changes in ownership or management; (4) elimination of other causes for which the debarment was imposed; or (5) other appropriate reasons.[63]

Table 2. Comparison of Statutory and Administrative Debarments

Characteristic	Statutory Debarments	Administrative Debarments
Authority for debarments	Various statutes	FAR (Part 9); Office of Federal Procurement Policy Act
Basis for debarments	Specified violations of statutes (e.g., violations of federal or state controlled substance laws; certain violations of the Buy American Act, Clean Air Act, Clean Water Act; etc.)	1. Contractors convicted of or found civilly liable for specified offenses 2. Agency officials found contractors engaged in specified conduct 3. Other causes affect present responsibility
Debarring official	Generally head of the agency administering the statute	Head of the contracting agency or a designee
Purpose	Often mandatory, occasionally discretionary	Always discretionary
Scope	Punitive	Preventative; cannot be punitive
Duration	Prescribed by statute	Commensurate with the offense, generally not over 3 years
Extent	Government-wide	Executive branch agencies
Waiving official	Generally the head of the agency administering the statute	Head of the contracting agency

Source: Congressional Research Service.

[58] 48 C.F.R. § 9.405(a).

[59] *Id.*

[60] Defense Federal Acquisition Regulation Supplement (DFARS) § 209.405(a)(2)(i)-(iv), *available at* http://www.acq.osd.mil/dpap/dars/dfarspgi/current/index.html.

[61] *Federal Procurement*, *supra* note 53, at 14.

[62] 48 C.F.R. § 33.103 & 104. *See* CRS Report R40228, *GAO Bid Protests: An Overview of Timeframes and Procedures*, by Kate M. Manuel and Moshe Schwartz for more information on bid protests generally.

[63] 48 C.F.R. § 9.406-4(c)(1)-(5).

Excluded Parties List System and Information about Excluded or Potentially Excludable Contractors

For debarment and suspension to operate most effectively, agency officials should know which contractors have been excluded, and they also need information about contractors' potentially excludable conduct. The Excluded Parties List System (EPLS) (https://www.epls.gov) has long listed contractors who are presently ineligible because of statutory or administrative debarments or suspensions. Agency officials must submit information on all excluded contractors to EPLS within five working days of the exclusion determination.[64] They also must check EPLS prior to awarding a contract because executive branch agencies may not award contracts to contractors listed in EPLS.[65] However, EPLS includes only contractors who are currently debarred or suspended, have previously been debarred or suspended, or have been proposed for debarment.[66] It does not include contractors who made voluntary changes to their personnel or policies in order to show continuing responsibility, or who entered administrative agreements with government agencies. In fact, the inclusion of administrative agreements in EPLS is one of the changes that the GAO has recommended to improve the suspension and debarment process.[67]

The 110th Congress enacted two laws increasing the amount of information available to agency officials about potentially excludable conduct. One law was the Close the Contractor Fraud Loophole Act, §§ 6101-6103 of the Supplemental Appropriations Act of 2008 (P.L. 110-252),[68] which amended the FAR's provisions on debarment to require that contractors timely notify agency officials of overpayments or federal crimes connected with the award or performance of a "covered contract or subcontract."[69] The act itself did not specify whom contractors are to notify, but regulations implementing the act require notification of both the contracting agency's inspector general and the contracting officer.[70] The other law was the Clean Contracting Act, §§ 871-873 of the Duncan Hunter National Defense Authorization Act for Fiscal Year 2009 (P.L. 110-417), which requires the creation of a database with information about contractors beyond that in EPLS.[71] This database is to cover all contractors that have at least one government contract

[64] 48 C.F.R. § 9.404(a)(1), (c)(3).

[65] 48 C.F.R. § 9.405(a).

[66] 48 C.F.R. § 9.404(c)(6).

[67] *Federal Procurement*, *supra* note 53, at 14.

[68] P.L. 110-252, §§ 6101-03, 122 Stat. 2323.

[69] Covered contracts or subcontracts are those that are greater than $5 million in amount and more than 120 days in duration, regardless of whether they are performed outside the United States or include commercial items. *Id.* Previously, under FAR §§ 9.405 and 52.209-5(a), contractors with awards worth more than $30,000 had to disclose the existence of indictments, charges, convictions, or civil judgments against them. Disclosure of existing legal proceedings is, however, different from disclosure of grounds upon which future legal proceedings could be based.

[70] DoD, GSA & NASA, Contractor Business Ethics Compliance Program and Disclosure Requirements, 73 Fed. Reg. 67,064, 67,093 (Nov. 12, 2008). On May 27, 2009, the General Services Administration issued a memorandum establishing procedures that contracting officers should follow when receiving such disclosures. *See* Contractor Fraud Disclosure Requirements, *available at* http://www.gsa.gov/graphics/staffoffices/AcquisitionLetter_V-09-05.pdf.

[71] P.L. 110-417, §§ 871-73, 122 Stat. 4356. The act also calls for the Interagency Committee on Debarment and Suspension to resolve which of multiple agencies wishing to exclude a contractor should be the lead agency in bringing exclusion proceedings and to coordinate exclusion actions among agencies. *Id.* at § 873(a)(1)-(2). The involvement of the Interagency Committee is potentially significant because although the FAR previously encouraged agencies to coordinate their exclusion efforts, it provided no requirement or mechanism for them to do so. *See* 48 C.F.R. § 9.402(c) ("When more than one agency has an interest in the debarment or suspension of a contractor, consideration shall be (continued...)

worth $500,000 or more.[72] For these contractors, the database is to include a brief description of all civil, criminal, or administrative proceedings involving contracts with the federal government that resulted in a conviction or a finding of fault within the past five years, as well as all terminations for default, administrative agreements, and nonresponsibility determinations relating to federal contracts within the past five years.[73] Entities with contracts worth more than $10 million, in total, are required to submit this information as part of the award process and update the information semiannually.[74] Access to the database is currently limited to acquisition officials of federal agencies, other government officials as appropriate, and the chairman and ranking Member of the congressional committees with jurisdiction.[75] However, legislation introduced in the 111th Congress would expand access to the database, as is discussed below.

Recently Enacted and Proposed Amendments

The magnitude of federal spending on contracts, coupled with recent high-profile examples of contractor misconduct, has heightened congressional interest in debarment and suspension. As the largest purchaser of goods and services in the world, the federal government spent more than $517.9 billion on government contracts in FY2008 alone.[76] Some of this spending was with contractors who reportedly received contract awards despite having previously engaged in serious misconduct, such as failing to pay taxes, bribing foreign officials, falsifying records submitted to the government, and performing contractual work so poorly that fatalities resulted.[77] Given this context, the 111th Congress has enacted one bill on debarment and suspension (P.L. 111-8, § 507) and is considering additional legislation (H.R. 595, H.R. 1334, H.R. 1668, H.R. 1983, H.R. 2349, H.R. 2568, H.R. 2708, H.R. 2825, S. 265, H.Amdt. 268 to H.R. 2647).

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given to designating one agency as the lead agency for making the decision. Agencies are encouraged to establish methods or procedures for coordinating their actions."). The Federal Acquisition Regulation councils issued the final rule implementing this section on July 1, 2009. *See* Dep't of Def., Gen. Servs. Admin., & Nat'l Aeronautics & Space Admin., FAR Case 2008-028: Role of Interagency Committee on Debarment and Suspension, 74 Fed. Reg. 31,564 (July 1, 2009).

[72] P.L. 110-417, at § 872(b)(1).

[73] *Id.* at § 872(c).

[74] *Id.* at § 872(f).

[75] *Id.* at § 872(e)(1).

[76] USASpending.gov, *Contracts and Other Spending in Billions of Dollars* (2009), *available at* http://www.usaspending.gov/index.php.

[77] *See, e.g.*, Project on Government Oversight, *Federal Contractor Misconduct: Failures of the Suspension and Debarment System* (2002), *available at* http://www.pogo.org/pogo-files/reports/contract-oversight/federal-contractor-misconduct/co-fcm-20020510.html ("[S]ince 1990, 43 of the government's top contractors paid approximately $3.4 billion in fines/penalties, restitution, and settlements. Furthermore, four of the top 10 government contractors have at least two criminal convictions. And yet, only one of the top 43 contractors has been suspended or debarred from doing business with the government, and then, for only five days."); Kathleen Day, Medicare Contractors Owe Taxes, GAO Says, *The Washington Post*, Mar. 20, 2007, at D1 (failure to pay taxes); Contract Fraud Loophole Exempts Overseas Work, *Grand Rapids Press*, Mar. 2, 2008, at A9 (bribery of foreign officials); Ron Nixon & Scott Shane, Panel to Discuss Concerns on Contractors, *New York Times*, July 18, 2007, at A15 (falsified records); Terry Kivlan, Shoddy Standards Blamed for Troop Electrocutions in Iraq, *National Journal's Congress Daily, PM Edition*, July 11, 2008 (poor quality work causing fatalities).

Amendments Enacted in the 111th Congress

Section 507 of the Omnibus Appropriations Act of 2009 requires that contractors found to have intentionally affixed a "Made in America" inscription or similar designation on ineligible products be debarred, under the FAR's procedures, from contracts funded under the act.[78] Congress included similar provisions in prior legislation,[79] and such provisions arguably represent a hybrid of the statutory and administrative debarment regimes. Section 507 addresses a grounds for debarment that is included in the FAR,[80] but it removes the discretion that agency officials would have under the FAR in determining whether to debar the contractor for the conduct in question.[81]

Amendments Proposed in the 111th Congress

Members of the 111th Congress have also proposed several other amendments to debarment and suspension law. Some amendments would create new statutory debarments for contractors who commit fraud;[82] have "seriously delinquent tax debt";[83] have engaged in a pattern or practice of paying workers "poverty-level" wages;[84] or cause serious injury or death to civilian or military personnel through gross negligence or reckless disregard of their safety.[85] Other proposed legislation would (1) amend the FAR to create additional grounds for administrative debarment (e.g., evasion of service of process or refusal to appear in suits brought against the contractor by the U.S. government or a U.S. citizen or national in connection with the performance of a federal contract);[86] (2) specify that certain conduct indicates a lack of business integrity subjecting the contractor to possible debarment under the FAR;[87] or (3) require debarment, under the FAR's

[78] P.L. 111-8, § 507, 123 Stat. 595 (Mar. 11, 2009). A similar provision is pending as part of the Indian Health Care Improvement Act Amendments. *See* H.R. 2708, § 315.

[79] *See, e.g.*, Science, State, Justice, Commerce, and Related Agencies Appropriations Act, P.L. 109-108, Title VI, § 607, 119 Stat. 2335 (Nov. 22, 2005). Some statutes give agency officials more discretion in determining whether to debar contractors for intentional misuse of "Made in America" designations. *See, e.g.*, P.L. 109-148, § 8041(b) ("If the Secretary of Defense determines that a person has been convicted of intentionally affixing a label bearing a 'Made in America' inscription to any product sold in or shipped to the United States that is not made in America, the Secretary *shall determine*, in accordance with section 2410f of title 10, United States Code, *whether the person should be debarred* from contracting with the Department of Defense.") (emphasis added).

[80] *See* 48 C.F.R. § 9.406-2(a)(4) (allowing agencies to debar contractors for intentional misuse of the "Made in America" designation).

[81] *See* P.L. 111-8, § 507 (requiring debarment from funds made available under the act for intentional misuse of the "Made in America" designation).

[82] Safety in Defense Contracting Act, H.R. 2825, § 2.

[83] Contracting and Tax Accountability Act, S. 265, § 3 (requiring that contractors who have "seriously delinquent tax debt" be proposed for debarment).

[84] An Act to Provide for Livable Wages for Federal Government Workers and Workers Hired Under Federal Contracts, H.R. 1334, § 3 (authorizing the Secretary of Labor to debar for up to five years contractors found to have engaged in a pattern or practice of paying "poverty-level" wages).

[85] Safety in Defense Contracting Act, H.R. 2825, § 2; National Defense Authorization Act for Fiscal Year 2010, H.R. 2647, § 824(b).

[86] "Rocky" Baragona Justice for American Heroes Harmed by Contractors Act, H.R. 2349, § 5. The debarment would be only from contracts for the same or similar goods or services that the contractor was providing when it was judged to have harmed someone.

[87] A Bill to Enact Certain Laws Relating to Small Business as Title 53 U.S.C., H.R. 1983, § 10504 (misrepresentation of a firm's status as a small business, Historically Underutilized Business Zone (HUBZone) small business; woman-
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procedures, for certain conduct (e.g., intentionally affixing a "Made in America" label on ineligible products, fraudulently representing that a firm is a small business, knowingly employing aliens without proper employment authorizations).[88] Yet other amendments would allow any Member of Congress to access the database of contractor information created under the Clean Contracting Act,[89] or require agencies to report annually to Congress on debarments under the act, apparently in the hope that problematic agency actions could be more readily detected and corrected.[90]

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owned-and-controlled small business; or small business owned and controlled by socially and economically disadvantaged individuals); *id.* at § 10505 (falsely certifying compliance with the requirements of another section of the act).

[88] Indian Health Care Improvement Act Amendments, H.R. 2708, § 315 (requiring that contractors found to have intentionally affixed a "Made in America" designation on illegible products be debarred from procurements funded under the act); Fairness and Transparency in Contracting Act, H.R. 2568, § 9 (requiring debarment of contractors found to have fraudulently misrepresented their status as small businesses or otherwise violated the act); Border Control and Contractor Accountability Act of 2009, H.R. 1668, § 2 (requiring contractors found to have directly employed, or to have known of a subcontractor's employment of, an alien whose immigration status does not authorize employment).

[89] H.Amdt. 268 to H.R. 2647, National Defense Authorization Act for Fiscal Year 2010. The sponsor of this amendment, Representative Janice Schakowsky, reportedly said that "Members of Congress making important decisions about ... contracting need all the facts. The [database] is a tremendous resource that until now has been off-limits to policy makers." *See* Geoffrey Emeigh, House Passes FY2010 DOD Authorization Measure; Administration Sends Veto Warning, *Fed. Contacts Daily*, June 26, 2009.

[90] Border Control and Contractor Accountability Act of 2009, H.R. 1668, § 2. *Cf.* United States v. New York & Puerto Rico Steamship Co., 239 U.S. 88, 93 (1915) (noting that the government needs the "protection of publicity").